

## Analysis & Perspective

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### Electronic Contracting in Europe

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### ELECTRONIC CONTRACTING

Electronic commerce in Europe is expanding rapidly. The European Union (EU) has enacted legislation aimed at preventing barriers to e-commerce between the EU member states and protecting European consumers. This article reviews the main provisions of that legislation.

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The use of information technology in global business is widespread and rapidly increasing. Electronic commerce is booming. In Europe, e-commerce is already worth 17 billion euros and is expected to reach 340 billion euros by 2003.<sup>1</sup> A European Commission survey shows that Internet penetration rose from 18 percent in March to 28 percent in October 2000, i.e., a 55 percent increase in six months.<sup>2</sup> The current European legal systems, of course, have not been designed for the information society and e-commerce.<sup>3</sup> Contracting on the World Wide Web raises questions about legal effectiveness and validity. Where the law requires a writing, does an electronic contract constitute a writing? If a document must be signed, is a digital signature valid? In particular in the "business-to-consumer" context, there are issues as to whether consumer protection and public health law requirements apply. More generally, to what extent do restrictions with respect to advertising, marketing, and standard conditions of sale apply to cross-border electronic contracts? Privacy and data protection legislation raise sensitive compliance issues. These issues are aggravated by uncertainty as to the law governing an e-contract in a cross-border context. Service providers and e-traders also face uncertainty when it comes to assessing whether they can obtain protection of their inventions or use technology without violating someone else's intellectual property rights. They face difficulty in identifying their legal responsibility and liability for violations of the law or infringement of intellectual property rights.

The European Community's (EC) current legislative framework centers on the e-commerce directive of May 4, 2000, which is aimed at ensuring that Information Society Services (ISS) benefit from the Internal Market principles of free movement of services and freedom of establishment between member states if they comply with the law in their home member states.<sup>4</sup> Member states must implement the directive before Jan. 17, 2002. Of particular relevance to e-commerce is also the directive on electronic signatures of Dec. 13, 1999.<sup>5</sup> This directive sets forth a general framework for the legal recognition of electronic signatures to be implemented by the member states before July 19, 2001. In addition to the e-commerce specific legislation, there are numerous EC directives that apply to one or more aspects of e-commerce. These directives include, in particular, the Directive on Distance Selling of Goods and the Directive on Unfair Terms in Consumer Contracts.

This article discusses electronic contracting under the EC e-commerce directive. In addition to this new e-commerce legislation, it addresses also contract issues under some of the applicable non-specific

directives. In some instances, references are made to member state national law. The discussion focuses on contract formation, informational requirements, and the right to withdraw. It reviews briefly the electronic signature legislation and initiatives with regard to electronic money.

## The E-Commerce Directive

On May 4, 2000, the EC adopted a Directive on Certain Legal Aspects of Electronic Commerce.<sup>6</sup> This directive is intended to address some of the legal uncertainties relating to contracting online and to establish a single market for electronic commerce within Europe. As noted above, this directive provides a legal framework for Information Society Services (ISS), which, as discussed below, is a term that has been broadly defined. The e-commerce directive is without prejudice to other EC and national legislation (not specifically regulating e-commerce) with respect to contracts, whether through electronic communication or otherwise, and the protection of public health or consumers, except where this other legislation is to be amended in accordance with the directive. In particular, Directive 97/7/EC on the Protection of Consumers in Respect of Distance Selling<sup>7</sup> and Directive 93/13/EEC on Unfair Terms in Consumer Contracts<sup>8</sup> remain applicable after the implementation of the e-commerce directive in the national law of the member states. In addition to these directives, a number of other directives remain fully applicable. Moreover, the member states' national contract law continues to apply.

## Information Society Services

The e-commerce directive covers all ISSs, including "business-to-business" (B2B), "business-to-consumer" (B2C), as well as "business-to-government" (B2G) relationships. ISSs are defined as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services," and thus span a wide range of online economic activities, such as providing electronic information services and selling goods online.<sup>9</sup> Indeed, the word "service" in "information society services" is somewhat misleading; selling products, which is generally thought of as distinguishable from rendering services, is clearly covered. In that case, the "service" may be only the offering of the possibility to contract over the Internet. In principle, both closed, access-controlled e-commerce and open access systems are covered. ISSs are not restricted to services that give rise to online contracting, but extend to services free of charge to the recipient funded by sponsoring or advertisement, such as services offering online information or commercial communications, and those providing tools allowing for search, access, and retrieval of data.<sup>10</sup> ISSs also include services consisting of the transmission of information via a communication network, providing access to a communication network, or hosting information provided by a recipient of the service. If natural persons use e-mail or an equivalent individual communication medium for personal or other non-business purposes, however, they are not subject to the directive's requirements, even where they enter into electronic contracts. Moreover, activities which by their nature cannot be carried out at a distance and by electronic means, such as medical services requiring a physical examination, are not ISSs. The e-commerce directive does not apply to matters already covered by data protection directives 95/46/EC<sup>11</sup> and 97/66/EC,<sup>12</sup> matters governed by cartel law, the activities of notaries or equivalent professions exercising public authority, the representation of clients before courts, and gambling activities. It also is not applicable in the area of taxation.

Once the e-commerce directive is implemented, which must be done by Jan. 17, 2002, service providers will be required to comply with the law of the country in which they are established. The directive defines the place of establishment of a service provider as the place where the service provider actually pursues an economic activity through a fixed establishment, irrespective of where its server or the technology supporting its Web site is located. In theory, if a provider complies with the laws of its country of origin, it does not have to worry about the laws of other member states where it offers services. The directive, however, provides for broad exceptions to this general rule. In addition, subject to limited exceptions, ISS providers may not be required to apply for a permit or any other prior authorization.<sup>13</sup>

## Contract Formation

A key feature of the e-commerce directive is that contracting on the Internet must be legally possible. Hence, member states must ensure that contracts concluded by electronic means are not deprived legal effectiveness nor validity on account of their having been made by electronic means. Electronic contracts must be considered in the member states' legislation as written contracts. By way of exception, member state law may stipulate that electronic contracting shall not be possible for certain types of contracts such as contracts creating or transferring rights in real estate (excluding rental rights), contracts requiring the involvement of courts, public authorities or professions exercising public authorities, suretyship agreements, contracts regarding collateral securities furnished by persons acting for purposes outside their trades, businesses, or professions, or contracts governed by family law or by law of succession.<sup>14</sup> Beyond these exceptions, national authorities cannot impose mandatory or restrictive rules that are specifically applicable to electronic contracts. This prohibition would appear to facilitate the use of model e-commerce agreements such as the Electronic Commerce Agreement of the United Nations Center for Trade Facilitation and Electronic Business,<sup>15</sup> and the draft Uniform Rules for Electronic Trade and Settlement of the International Chamber of Commerce.<sup>16</sup>

## Identification

Contracting on the Internet presents difficulties in identifying the other contracting party. To further customer protection and facilitate enforcement, the e-commerce directive requires that all service providers clearly identify themselves. Service providers must make the following information easily, directly and permanently accessible to the intended customer and the competent authorities:<sup>17</sup>

- the name of the service provider,
- the geographic address where the service provider is established,
- the means by which the service provider can be contacted rapidly and in a direct and effective manner, including his e-mail address,
- trade register number and location,
- if the activity of the service provider is subject to an authorization, the authorization and the particulars of the supervisory authority,
- if the activity of the service provider is a regulated profession, information as to the professional body with which the provider is registered, and
- VAT number.

Where reference is made to prices, these must be indicated clearly and unambiguously. It must also be made clear whether the indicated price is inclusive of taxes and delivery costs. This information should also be supplied by ISS providers that do not offer online contracting. The directive does not specify at what point in time this information is to be supplied. A reasonable interpretation of this provision would suggest that at the latest it should be provided at the time of contracting, which is also what the distance selling directive discussed below requires.

## Commercial Communications

The e-commerce directive imposes certain specific requirements with respect to "commercial communications." It deals with unsolicited commercial communications by e-mail and commercial communications that are part of or constitute an ISS. Information constitutes a "commercial communication," when "it is designed to promote, directly or indirectly, the goods, services or image of a company, organization or person pursuing a commercial, industrial or craft activity or exercising a regulated profession."<sup>18</sup> Domain names and e-mail addresses are not regarded as commercial communications. It is not entirely clear what is meant by "part of or constitutes an ISS." Given the broad statements in the recitals of the directive, this term will likely be deemed to cover also advertising on the Web where there is no possibility to enter into any agreement, even though there is no individual request of the "recipient." Non-electronic commercial communications, i.e., communications by conventional means, are not subject to the directive's rules. Member states must ensure the possibility for regulated professions, such as lawyers or accountants, to provide commercial communications, provided that these communications comply with their professional rules.<sup>19</sup>

Under the directive's transparency requirements, commercial communications must be identifiable as such, and the natural or legal person on whose behalf the commercial communication is made must be identified. This applies to both solicited and unsolicited commercial communications, and also to promotional offers, such as discounts premiums and gifts, and promotional games. As to the latter, in addition, the conditions for participation must be clearly and unambiguously identifiable.<sup>20</sup>

The directive specifies that unsolicited commercial communications must be identified as such "as soon as they are received by the recipient." As a result of this requirement, filtering or blocking software will recognize the commercial communications when they come in, and recipients that do not want to receive any such "spam" are able to effectively get rid of it. Moreover, under the EC's privacy legislation, member states are free to choose between an opt-in system, under which unsolicited commercial communication may be sent only with the consent of the recipient, or an opt-out system under which the recipient is to signal himself if he does not wish to receive unsolicited commercial communications. If a member state has chosen the opt-out system, the e-commerce directive requires that it ensure that information service providers regularly consult and respect the opt-out registers.<sup>21</sup> In addition, if in online marketing personal data are collected specific privacy-related rights are triggered. If personal data are transferred to a country offering an inadequate level of data protection, consent for such transfer may be required. This regime would appear to create difficult and onerous management issues for firms engaged in direct online marketing.

## Procedural Information

The directive requires certain procedural information before parties can enter into a contract. To avoid technical problems or mistakes by the contracting parties, the service provider must provide the following information:<sup>22</sup>

- the different technical steps that are to be followed to conclude the contract,
- whether the contract will be filed by the service provider and whether it will be accessible,
- the technical means for identifying and correcting input errors prior to the placing of the order, and
- the languages offered for the conclusion of the contract.

However, parties that are not consumers may agree that this information is not required. For purposes of the e-commerce directive, a consumer is "any natural person who is acting for purposes which are outside his or her trade, business or profession."<sup>23</sup> *A contrario*, this suggests that other information requirements such as those discussed above, are mandatory and that neither consumers, nor professional parties may agree otherwise. The directive does not specify whether this information must be provided only to first-time customers or to all customers, including regular consumers. For instance, would a customer that purchases online from a particular supplier on a regular basis have to be informed of the procedure, each time he visits the site? Unfortunately, the directive does not specifically address this issue. Insisting that information is required each visit, however, would serve no useful purpose. It would also frustrate simplified or abbreviated Web purchasing procedures, such as Amazon.com's "one click" shopping method.

If e-traders or information service providers subscribe to codes of conduct, like the Dutch ECP Code of Conduct,<sup>24</sup> they must so indicate. They must also provide information on how the pertinent code can be consulted electronically.<sup>25</sup> Also, contract terms and any general conditions provided to the recipient must be made available "in a way that allows him to store and reproduce them."<sup>26</sup> This provision may well be intended to require that contract terms be transmitted electronically in a reproducible file format. However, a hard copy by mail would not violate the terms of this provision.

The procedural information requirements discussed in this paragraph do not apply to contracts "concluded exclusively by exchange of electronic mail or by equivalent individual communications." This exception would appear to be limited to non-standardized forms of contracting on a case-by-case basis. It will probably not apply if there is a Web site involved.

## Other Information Requirements

Directive 97/7/EC on the Protection of Consumers in Respect of Distance Contracts of May 20, 1997<sup>27</sup> (the "distance selling directive") applies also to electronic contracts, since electronic contracting should be regarded as one way of distant contracting.<sup>28</sup> Consequently, the consumer rights, such as the right to information and right to withdraw, granted by the distance selling directive apply also B2C e-commerce. Distance contracts include both sale of goods and service contracts.<sup>29</sup> The definition of distance contracts refers to an "organized distance sales or service-provision scheme run by the supplier." Thus, arguably e-commerce models that are not "organized" for distance sales (e.g., incidental sales through a Web site intended solely for advertising) or are not "run by the supplier" (e.g., virtual shopping malls organized by third parties are not covered).

Some of the information requirements set forth in the e-commerce directive are also included in the directive on distance selling. Most of the additional information requirements set forth in the distance selling directive relate to the object of the contract. The additional information required by the distance contracts directive that must be provided by any information service provider who wishes to enter into an agreement with a consumer include:<sup>30</sup>

- the main characteristics of the goods or services,
- the price of the goods or services, including all taxes,
- the delivery costs, if any,
- the arrangements for payment, delivery or performance,
- the existence of a right of withdrawal, if applicable,
- the cost of using the means of distance communication, if it is calculated other than at the basic rate,
- the period for which the offer or the price remains valid, and
- where appropriate, the minimum duration of the contract in case of contracts for the supply of products or services to be performed permanently or recurrently.

These data are to be provided in a "clear and comprehensive" manner and "in good time" prior to the conclusion of any distance contract. If initially provided in a "non-durable medium," e.g., orally, the consumer must receive this information also in writing or in another "durable medium" available to him, during the performance of the contract and at the latest at the time of delivery of the goods. In addition, the following data are to be supplied in writing or in a "durable medium":<sup>31</sup>

- written information on the conditions and procedures for exercising the right of withdrawal,
- the geographical address of the place of business of the supplier to which the consumer may address any complaints,
- information on after-sales services and guarantees "which exist," and
- the procedure for canceling the contract, where it is of unspecified duration or a duration exceeding one year.<sup>32</sup>

In the case of e-commerce, there is an issue as to whether the geographical address may be replaced by the virtual address. If this information is provided only through a Web site, the Web site should be sufficiently "durable" to meet the "durable medium" requirement. If a Web site changes regularly, it may not be deemed "durable." If, on the other hand, the consumer receives the information by e-mail, the "durable medium" requirement will likely be deemed to be met. In case the customer can print or download the information from a Web site, which alerts the customer to this option, the requirement would also appear to be met.

## Non-Compliance with Information Requirements

The e-commerce directive requires that member states ensure that service providers supply customers with certain information, but no provision of the directive specifies any sanction or consequence in the

event contracts are concluded without the provider having supplied the required information. As a result, the legal consequences to be attributed to non-compliance with the information requirements are exclusively a matter of national law.

Under Belgian law, for instance, if failure to comply with the information requirements is deemed to occur in the pre-contractual phase, the service provider may be liable under tort law.<sup>33</sup> Indeed, once the directive is implemented, failure to provide the required information would likely be considered a "fault by breach of law" under Belgian tort law. If evidence is provided that there is a causal link between the fault and the damages, this may result in an award for damages based on Article 1382 of the Belgian Civil Code.

Although non-compliance with the information requirements may constitute a tort under Belgian law, it does not necessarily affect the validity of the contract concluded. Article 9 of the directive provides that electronic contracts may not be distinguished from traditional written contracts. The information requirements may thus not be viewed as mandatory formalities of a particular, formal contract, like a contract for the sale of real estate. Consequently, failure to comply with the information requirements may not, in itself, result in the contract being declared null and void, as would be the case with formal contracts. However, failure to comply with the information requirements may be constitutive of an invalid offer or acceptance and thus lead to a voidable contract.<sup>34</sup>

## Placing of the Order

Unlike the initial proposal, the e-commerce directive as adopted does not establish the time at which the contract must be considered as concluded, nor does it determine when a service provider may be considered as having made an offer on the Internet. The directive provides only that, except if otherwise agreed by parties who are not consumers, whenever a customer places an order, the service provider must acknowledge receipt of the order without undue delay and by electronic means. Furthermore, the service provider must provide for effective and accessible technical means allowing the consumer to identify and correct input errors prior to the placing of the order.<sup>35</sup> The obligations to acknowledge an order and to provide technical means for the customer to correct input errors do not apply to contracts "concluded exclusively by electronic mail or by equivalent individual circumstances."<sup>36</sup> In e-commerce models involving Web sites, this exception will likely be deemed not to apply.

Note, however, that the directive does not attribute any legal effect to the placing of an order or the acknowledgment of such order. Whether a contract is entered into and at what time the contract has been concluded are issues governed by national law. However, the directive establishes that the order and the acknowledgment of receipt shall be deemed received when the parties to whom they are addressed are "able to access them." In e-commerce, this probably requires that the pertinent message arrived in the intended recipient's mail box or at his Web site.

## Electronic Signature

As noted above, contracting on the Internet raises questions with respect to the identification of the contractors. Identification is an issue for both the service recipient and the service provider. The contracting parties will often not be able to identify beyond reasonable doubt the person with whom they are contracting. In addition, problems arise with respect to the authentication of communications. Both issues are addressed through the use of electronic signatures.

Directive 1999/93/EC<sup>37</sup> of Dec. 13, 1999 sets forth a general framework for electronic signatures to be implemented by the member states before July 19, 2001. The directive's purpose is to facilitate the use of electronic signatures and to contribute to their legal recognition. Generally, the electronic signature consists of two cryptographic keys, a private key only known by its holder, and a public key that is publicly known, both of which are delivered by a certification-service provider.<sup>38</sup> The sender of a message

encrypts his message by using his private key and sends the encrypted message to the recipient. The message can then only be read by the recipient by using the sender's matching public key. Moreover, any modification of the encrypted message inserted before its receipt, makes it impossible for the recipient to decrypt the message. As a result, since only the matching public key linked to the identity of the key owner, i.e., sender, enables the recipient to open and read the message, the electronic signature permits the identification of the sender. Since any modification of the message after it is sent to the recipient makes it impossible for the recipient to decrypt the message, electronic signatures also permit authentication of the message.

The directive makes a distinction between "electronic signatures" (regular electronic signatures) and "advanced electronic signatures," and attributes different legal value to each. A regular electronic signature is very broadly defined as "data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication."<sup>39</sup> No specific requirements are laid down in the directive, as it merely seeks recognition by the member states of electronic signatures that are already used in the information technology sector and for which requirements have been adopted by the practice in this sector. An advanced electronic signature, on the other hand, is defined as "an electronic signature which meets the following requirements: (1) it is uniquely linked to the signatory, (2) it is capable of identifying the signatory, (3) it is created using means that the signatory can maintain under his sole control, and (4) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable." Both types of electronic signatures have legal effectiveness and are admissible in court as evidence. However, advanced electronic signatures, which are based on a "qualified certificate"<sup>40</sup> and which are created by a "secure-signature-creation device"<sup>41</sup> must be accorded exactly the same legal consequences as handwritten signatures. In other words, both types of electronic signature are admissible as evidence, but courts have broader discretionary authority in assessing the probative value of regular electronic signatures.

## Electronic money

Payment, of course, is a key element of electronic contracting. In lieu of credit cards, electronic money (e-money) is increasingly used in contracting over the Internet. E-money can best be conceived as a digital form of cash money and is used primarily for limited value payments. The monetary value is stored either on a "chip" card or in a software program. Unlike with credit cards, the use of electronic money is not subject to prior authorization from a bank or any other third party. The EU is building up a regulatory framework for electronic money. The purpose of these regulations is to set minimum rules and to ensure that institutions issuing electronic money are stable and sound so as to promote confidence between business and consumers and thus facilitate the development of electronic commerce.

Two directives regarding electronic money have recently been adopted. The first directive regulates the taking up, the pursuit of, and the prudential supervision of the business of electronic money institutions.<sup>42</sup> It defines electronic money in a technology-neutral manner and specifies which type of business activities may be undertaken by electronic money institutions. The directive furthermore harmonizes rules relating to the prior authorization of electronic money institutions by the competent authorities, initial capital requirements, minimum standards of management, sound and prudent operational requirements, and ongoing supervision. It provides that the directives concerning Consolidated Supervision and Money Laundering apply also to electronic money institutions. The second directive<sup>43</sup> amends the definition of "credit institution" within the meaning of the first banking coordination directive to bring electronic money institutions within the general regulatory regime of the directive relating to the taking up and pursuit of the business of credit institutions.<sup>44</sup> In doing so, the directive allows enterprises that issue only electronic money without undertaking the full range of banking operations to operate throughout the single European market on the basis of authorization in one member state.

## Right of Withdrawal

Pursuant to Article 6 of the directive on distance selling, which is also applicable to electronic contracts, a consumer that has entered into a contract, is entitled to withdraw from the contract during a period of a least seven working days. The provider must inform the consumer of this right of withdrawal prior to the conclusion of the contract. The consumer must be able to exercise his right of withdrawal without any penalty and without giving any reason. The only permissible charge for the consumer's account as a result of his exercising the right of withdrawal is the direct cost of returning the goods. Any money paid by the customer must be reimbursed by the provider as soon as possible, but in any case within 30 days. The withdrawal right cannot be waived.

The seven-day withdrawal period starts, in case of supply of goods, on the day of receipt of the goods by the consumer, and in case of supply of services, on the day of conclusion of the contract. However, in the event that the service provider does not provide the information required by the distance selling directive discussed above, the period of withdrawal is extended to three months from the day of delivery of the goods or the conclusion of the contracts for services. If the service provider meets his information obligation during this three-month period, the seven-day withdrawal period begins to run as from that moment.

- Unless the parties have agreed otherwise, the consumer may not exercise the right of withdrawal in respect of contracts:
- for the provision of services if performance has begun, with the consumer's agreement, before the end of the seven working day period,
- for the supply of goods or services the price of which is dependent on fluctuations in the financial market which cannot be controlled by the supplier,
- for the supply of goods made to the consumer's specifications or clearly personalized or which, by reason of their nature, cannot be returned or are liable to deteriorate or expire rapidly,
- for the supply of audio or video recordings or computer software which were unsealed by the consumer,
- for the supply of newspapers, periodicals and magazines, or
- for gaming and lottery services.

Consequently, if such contracts are made electronically, the consumer has a right to withdraw only if specifically agreed with the provider.

## The Future of E-Commerce in Europe

In this article, we have discussed some of the EC law relevant to electronic commerce. Thus far, apart from the onerous privacy and data protection legislation, the EC's focus has been primarily on facilitating e-commerce, although the EC has not yet addressed important contract law issues and the question of the governing law. Such a policy indeed is much more likely than a one-sided consumer protection approach to ensure that Europe will benefit from the information society. It should be noted, however, that important legislative changes will likely occur over the next decade. The convergence between the traditional IT sectors is the driving force behind the EC's new regulatory approach to electronic commerce. On Dec. 3, 1997, the commission published a green paper on convergence to raise the issue of the regulatory approach to convergence.<sup>45</sup> The green paper discusses the issue as to what kind of regulatory framework is necessary to ensure a favorable environment for convergence. The commission's current thinking is that IT regulation should promote and encourage both competition between operators and the competitiveness of European industry in general, that it should be technology neutral, and that it should meet a number of public interest objectives such as the protection of minors, the protection of consumers, and the promotion of European content in all its forms.

To further the public interest in the information society and e-commerce, on Dec. 8, 1999, the Commission launched the "eEurope" initiative. eEurope sets ambitious targets to bring the benefits of the information society within reach of all Europeans. The initiative addresses issues ranging from cheaper Internet access and accelerating electronic commerce to health care online and risk capital for high-tech SME's. The idea is to encourage Europe's transition to a competitive, dynamic and knowledge-based

economy by providing cheaper, faster and secure Internet, investing in people and skills, and stimulating the use of the Internet.

As e-commerce in Europe continues to expand, there will likely be calls for additional EC legislation to protect consumers and minors, to prevent fraud, etc. The EC should think twice before embarking on an ambitious legislative e-commerce program. Burdensome e-commerce regulations may well have adverse consequences and create disincentives for electronic contracting. E-commerce regulation aimed at eliminating barriers and providing for clear and unambiguous rules on the law of e-contracts is one thing. But an unbalanced policy driven by protection motives is quite another. The information age, in fact, promises to reduce the need for consumer protection by enabling consumers to gain access to more information in a shorter period of time, thus enabling them to protect themselves. In addition, technological advances, such as blocking and filtering software, will reduce concerns about access to certain sensitive sites. A future European e-commerce policy should take these developments into account, and carefully balance the interests involved.

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<sup>1</sup> Likkanen E. An Information Society For All. Speech, Madrid, Jan. 11, 2000,  
<http://www.europa.eu.int/comm/information-society/speeches/liikkanen/madrid.en.htm>.

<sup>2</sup> See <http://europa.eu.int/rapid/start/cgi/guesten.ksh?>

p\_action.gettxt=gt&doc=IP/00/1388|0|RAPID&lg=EN.

<sup>3</sup> For an explanation of the technical features of the World Wide Web, see Gralla P. *How the Internet Works*. Millennium Edition. Indianapolis: Que, 1999.

<sup>4</sup> Directive 2000/31/EC of June 8, 2000, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the "e-commerce directive"), OJ L178, July 17, 2000, p. 1.

<sup>5</sup> Directive 99/13 of Dec. 13, 1999, on a Community Framework for Electronic Signatures, OJ L13, Jan. 19, 2000, p. 12.

<sup>6</sup> The directive has been considered by the Lisbon summit as a top priority in preparing Europe's transition to a knowledge-based economy and boosting competitiveness.

<sup>7</sup> Directive 97/7 on the Protection of Consumers in Respect of Distance Selling , OJ L144, June 4, 1997, p. 19.

<sup>8</sup> Directive 93/13 on unfair terms in consumer contracts, OJ L95, April 21, 1993, p. 29.

<sup>9</sup> Article 2(a), E-commerce Directive, and Article 1(2), Directive 98/34, as amended by Directive 98/48.

<sup>10</sup> Recital 18, E-commerce Directive. Television and radio broadcasting are not covered because they are not provided at individual request. Video-on-demand, however, is covered.

- <sup>11</sup> Directive 95/46 of Oct. 24, 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L281, Nov. 23, 1995, p. 31 (the "privacy directive").
- <sup>12</sup> Directive 97/66 concerning the processing of personal data and the protection of privacy in the telecommunications sector.
- <sup>13</sup> Article 4(1), E-commerce Directive.
- <sup>14</sup> Article 9(2), E-commerce Directive.
- <sup>15</sup> UN/CEFACT. Recommendation No. 31. Geneva, May 2000, <http://www.unece.org/leginstr/cover.htm>
- <sup>16</sup> ICC Electronic Commerce Project (ECP). <http://www.iccwbo.org/>.
- <sup>17</sup> Article 5, E-commerce Directive.
- <sup>18</sup> Article 2, E-commerce Directive.
- <sup>19</sup> Article 8, E-commerce Directive.
- <sup>20</sup> Article 6, E-commerce Directive.
- <sup>21</sup> Article 7, E-commerce Directive.
- <sup>22</sup> Article 10, E-commerce Directive.
- <sup>23</sup> Article 2, E-commerce Directive.
- <sup>24</sup> See <http://www.ecp.nl/>.
- <sup>25</sup> Article 10(2), E-commerce Directive.
- <sup>26</sup> Article 10(3), E-commerce Directive.
- <sup>27</sup> Directive 97/7 on the protection of consumers in respect of distance contracts, OJ L144, June 4, 1997, p. 19 (the "distance selling directive").
- <sup>28</sup> For purposes of this directive, a distance contract means "any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded." Article 2, Directive on Distance Selling.
- <sup>29</sup> Article 2(1), Distance Contracts Directive.
- <sup>30</sup> Article 4, Distance Selling Directive.
- <sup>31</sup> Article 5, Distance Selling Directive.

<sup>32</sup> This requirement does not apply to services which are performed through the use of a means of distance communication, where they are supplied on only one occasion and are invoiced by the operator of the means of distance communication. Nevertheless, the consumer must in all cases be able to obtain the geographical address of the place of business of the supplier to which he may address any complaints.

<sup>33</sup> This will not be the case if parties have concluded an agreement with respect to the pre-contractual negotiations.

<sup>34</sup> This would likely also be the case under the laws of other civil law jurisdictions.

<sup>35</sup> Article 11, E-commerce Directive.

<sup>36</sup> Article 11, E-commerce Directive.

<sup>37</sup> Directive 99/93 on a Community Framework for Electronic Signatures, OJ L 13, Jan. 19, 2000, p. 12 (the "e-signature directive").

<sup>38</sup> Article 2 of the directive defines a "certification-service provider" as "an entity or legal or natural person who issues certificates or provides other services related to electronic signatures." A "certificate" is defined as "an electronic attestation which links signature-verification data to a person and confirms the identity of that person."

<sup>39</sup> Article 2(1), E-signature Directive.

<sup>40</sup> A "qualified certificate" is a certificate that meets the requirements laid down in the Annexes I and II to the directive, in which standards of reliability are set forth.

<sup>41</sup> A "secure-signature creation device" is a signature-creation device, i.e. configured software or hardware used to implement the signature-creation data, that meets the requirements laid down in Annex III to the directive.

<sup>42</sup> Directive 2000/46/EC on the taking up, pursuit of, and prudential supervision of the business of electronic money institutions, OJ L 275, Sept. 18, 2000, p. 39.

<sup>43</sup> Directive 2000/28 amending directive 2000/12/EC relating to the taking up and pursuit of the business of credit institutions, OJ L275, Oct. 27, 2000, p. 37.

<sup>44</sup> Directive 2000/12 Relating to the Taking Up and Pursuit of the Business of Credit Institutions, OJ L126, March 20, 2000, p. 1.

<sup>45</sup> Green Paper on the Convergence of the Telecom, Media and IT Sectors, and the Implication for Regulation towards an Information Society Approach, COM(97) 623, Dec. 3, 1997.

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